Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

No. 94 -

GARY ALLEN RIMERT,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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QUESTIONS PRESENTED

1.

Whether the "rational trier of fact" standard of *Jackson v. Virginia* governs review of the sufficiency of the evidence of a criminal defendant's sanity.

2.

Whether a trial court's refusal to inform the jury of the dispositional consequences of its verdicts of "guilty but mentally ill" and "not guilty by reason of insanity" can so burden a defendant's right to jury consideration of his insanity defense as to deny him due process.

3.

Whether due process mandated an exception to the general rule of *Shannon v. United States* against jury instructions on the consequences of the jury's verdicts in insanity cases, where

(A) the jury's alternative verdicts of "not guilty by reason of insanity" and "guilty but mentally ill" were prejudicially misleading,

(B) the prosecutor unfairly implied that a "guilty but mentally ill" verdict would assure petitioner's hospitalization,

(C) the evidence conclusively established that the defendant's mental illness was severe, potentially dangerous and permanent, and

(D) the state court record shows that petitioner's conviction was the direct result of actual jury misunderstanding concerning the effects of its verdicts.

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The petitioner, Gary Allen Rimert, prays that a writ of certiorari issue to review the judgment of the South Carolina Supreme Court.

CITATION TO OPINION BELOW

The opinion of the South Carolina Supreme Court affirming petitioner's convictions is reported as *State v. Rimert*, 446 S.E.2d 400 (S.C. 1994), and is reprinted in the appendix to this petition at A–1 to A–6. The order of the South Carolina Supreme Court granting petitioner's motion to supplement the record and denying his petitioner for rehearing is unreported, and is reprinted *infra* at A–7.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on June 13, 1994. A timely petition for rehearing was denied on July 29, 1994. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> "[N]or shall any state deprive any person of . . . liberty . . . without due process of law . . ."

It further involves S.C. Code Ann. §§ 17–24–10 *et seq.*, which are reprinted *infra* at A–9–13.

STATEMENT OF THE CASE

In 1982, immediately after the acquittal of John Hinckley for the attempted assassination of President Reagan, the South Carolina legislature considered a proposal to abolish the defense of insanity. H.R. 3216, 104th Leg., 2d Sess. (S.C. 1982). Ultimately, however, South Carolina rejected this proposal, and chose instead to codify its common law *M'Naghten* rule governing insanity, while tightening the procedures governing commitment and release of insanity acquittees. 1984 S.C. Act No. 396 §§ 1, 4, *codified as* S.C. Code Ann §§ 17-24-10, -40 (1993 Supp.). At the same time, South Carolina created a new verdict of "guilty but mentally ill" (GBMI) applicable to defendants whose mental illness rendered them unable to conform their conduct to the requirements of the law, but nevertheless capable of discerning the wrongfulness of their actions. S.C. Code Ann. § 17-24-20 (1993 Supp.). Defendants convicted under the South Carolina GBMI statute are sentenced as if they had been found guilty, and are confined in the general prison population following an initial psychiatric evaluation by the Department of Corrections. S.C. Code Ann. § 17-24-70 (1993 Supp.).

In this case, petitioner presented overwhelming and essentially uncontradicted lay and expert testimony that he was legally insane when he committed four motiveless and unprovoked homicides while in the grip of a schizophrenia-induced psychosis. The jury nevertheless convicted him, and the state argued on appeal that the federal due process standard of evidentiary sufficiency enunciated in *Jackson v. Virginia*, 443 U.S. 307 (1979), was inapplicable to appellate review of the evidence of his sanity. The state court failed to specify the standard of review being employed, stating simply that there was evidence to support the jury's finding of sanity. Because any such evidence was plainly insufficient

to permit any rational trier of fact to find that petitioner had failed to meet his burden of proving insanity, the applicability of *Jackson's* "rational trier of fact" standard is determinative. Petitioner's case also presents the issue of whether the presence of South Carolina's new "guilty but mentally ill" verdict, together with evidence and prosecutorial argument that placed the post-trial disposition of the defendant at the center of the jury's concerns, so interfered with the jury's ability to provide an impartial assessment of the facts of his case as to deny due process. The pertinent facts are as follows.

A. Background and psychiatric history

Petitioner Gary Rimert is the only child of Betty and Wick Rimert. The Rimerts adopted Gary when he was a newborn infant, R. 191-92,[1] and at time of the homicides, Gary was a twenty-one year old college student living with his parents in Lafayette, Indiana. Mrs. Rimert's parents, Henry and Alice Rohrs, lived in South Carolina, and Gary maintained a very close relationship with his grandparents, frequently going to South Carolina to visit them. R. 187-88, 193-94.

Gary displayed the first indications of what would later develop into serious mental illness in the fourth grade, when he was assigned to a special class for emotionally disturbed children. Later, during his early and mid-teenage years, he saw a psychologist, Dr. Judith Anderson, periodically. R. 189-190; 193. Following the classic course of schizophrenia, his mental illness became acute just after adolescence. In the late spring of 1990 he began to experience paranoid delusions that the police were watching and

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[1]Except where otherwise noted, all references to the record ("R. ___") are to the Record on Appeal in the South Carolina Supreme Court.

following him, R. 195, as well as irrational beliefs about the circumstances of his birth, R. 195–197, and, in particular, about a former girlfriend named Tracy Smith. R. 165–166; 197–198. He became obsessed with contradictory plans to both harm and rescue Tracy, and was convinced that the police were reading his mind and planning to arrest him for his thoughts. R. 166; 198–199. On June 13, 1990, after staying up all night to make sure that Gary did not leave home without her knowledge, Mrs. Rimert called Dr. Anderson and asked her to see Gary right away. R. 166–167; 181. Dr. Anderson found Gary to be actively psychotic, experiencing visual and auditory hallucinations, and extremely confused. R. 182–183. Recognizing that he needed immediate psychiatric hospitalization, she contacted a psychiatrist who admitted him to Home Hospital in Lafayette, Indiana the same day. R. 183–184.

Despite being placed on antipsychotic medication, R. 167, Gary had "a somewhat uneven hospital course" over the next twenty-seven days. R. 169. The Home Hospital records indicate that Gary continued to suffer from auditory hallucinations and paranoid delusions while in the hospital, and only near the time of his discharge on July 11 did he begin to demonstrate some awareness of the reason for his hospitalization. R. 167–169. Less than a week before his discharge, he was still experiencing auditory hallucinations concerning Tracy. R. 168–169. The records further reflect that on July 11, a hospital administrative staff member sent Mrs. Rimert a memorandum pointing out that Gary had only three more days of hospitalization coverage on his health insurance policy. R. 163. He was released from the hospital the same day, despite evidence that he was still delusional. R. 169; 184–185.

Two days after his discharge, on July 13, 1990, Gary saw Dr. Anderson at her office in Lafayette. He had deteriorated substantially from the rather unstable condition in which

she had found him when she last saw him at the hospital. He appeared to be actively hallucinating, his thinking was illogical and obsessive, he admitted to hearing voices, his manner was mechanical, and his affect was extremely flat. R. 185–187. He harbored delusions about kidnapping Tracy and taking her to Florida for her own protection. In response to questioning by the trial judge, Dr. Anderson expressed the opinion that at the time of her session with Gary on July 13, he lacked the capacity to distinguish right from wrong. R. 188–189.

B. The homicides and their aftermath

That night, Gary took his parents' car without their permission and started driving south, impelled by a delusion that Tracy was going to be "dumped off" in Tampa, Florida, and that she was "going to end up as a whore" unless he went there to find her. R. 90; 170. He left his antipsychotic medication at his parents' home. R. 200. During the night, the Rimerts talked with Gary's psychiatrist about what to do and tried to locate Gary by telephone. R. 200–201.

After driving and listening to his voices all night, R. 73, Gary arrived at his grandparents' home around 8:00 a.m. on the morning of July 14. R. 3. Thirty minutes later he called his parents in Indiana. He told his mother, "I'm scared stiff," and insisted that the police had chased him all the way from Indiana the previous night. R. 202. Mrs. Rohrs came onto the line and told Mrs. Rimert that her grandson seemed "dazed." R. 203; 171. There followed a series of frantic phone calls to a doctor and a pharmacy in York County, as Mrs. Rimert attempted to secure the anti-psychotic medication that Gary needed. R. 171; 203–205.

Mrs. Rimert made her last call to her parents at 10:27 that morning. R. 207. Her father answered the telephone, and moments later Mrs. Rimert could hear her mother

screaming in the background. R. 207–208. Gary came on the line, and Mr. Rimert, who had picked up an extension phone, tried to engage him in conversation. Gary did not respond to his father, however, but just repeated, "No, no, no" over and over. R. 208–209. Mrs. Rimert immediately called residential security, and Officers Crawford and Kennington proceeded to the Rohrs' residence.

On arrival, Officer Crawford noticed blood smeared on the Rohrs' front door and porch, and Gary standing inside the house near a picture window, smoking a cigarette. Crawford motioned to him to come out, and after some delay he did. R. 8–9. He had blood "all over him." R. 9–10. Gary complied with Crawford's instructions to sit down and to submit to being handcuffed and placed in the officers' patrol car, but Crawford stated that Gary was "mumbling something," R. 10–13; 26, and that he was sweaty, very pale, and had a "blank look" on his face "like he could see right through you." R. 18; 116.

Keith Kennington, another River Hills security officer, arrived at the Rohrs' residence at the same time as Officer Crawford. R. 29–30. He described Gary as seeming "like he was in sort of a daze or something; like he didn't know what he was doing or where he was at either one," R. 34, and stated that Gary seemed unable to recognize that he done something wrong. R. 37.

Emergency Medical Technician Frederica Alley arrived on the scene three or four minutes after Crawford and Kennington. She began to question Gary: he gave her his name, and when she asked him where his grandparents were, he replied, "They're dead, they're all dead." R. 39–40.

Ms. Alley and the security officers then found Mr. Rohrs lying dead in his house and the other three victims at the Petersen's residence. Gary spent the next hour sitting in the police car, and Ms. Alley checked on him periodically. Her description of his appearance during the several minutes

after she and the officers first arrived on the scene was as follows:

> Under different circumstances, I might have suspected that he was in shock . . . . He was not reacting normally to the presence of two police officers. He was not answering my questions; he was in a twilight stage. I don't know if you're familiar with the postictal state that people who have seizures have but it was similar to that. They're there, but they're not there.

R. 43. Ms. Alley went on to describe Gary as exhibiting "very flat affect, no emotion; there was no rise and fall in the tone of his voice," even when he informed the officers that his grandparents were dead. R. 44–45. Like Officer Kennington, Ms. Alley testified on the basis of her several minutes of conversation with Gary and of her observation of him at the scene, that she did not think he was able to recognize that he had done something wrong. R. 47.

Sgt. Jerry Hoffman of the York County Sheriff's Department was the fourth person to respond to the call to the Rohrs' that morning. After Ms. Alley and Officer Crawford informed Hoffman that they had found bodies at the Petersens' and that Gary was in the patrol car, Hoffman searched and secured both the Petersen and Rohrs residences. R. 53–56.

The crime scene investigation revealed the body of Mr. Rohrs lying just inside the front door. R. 116. His body bore 16 stab wounds and lacerations. R. 127. Bloody bare footprints were noted nearby. R. 122. The house was otherwise very orderly, with no signs of a struggle. R. 122, 9–12. The apparent murder weapon, a knife from the Rohrs' kitchen drawer, lay on the counter next to the sink. State's

Exhibits 1, 16, 17 & 18. The knife appeared to have been rinsed, but still had traces of blood on it. R. 116–121. Although an effort was made to lift latent fingerprints from the knife, the SLED fingerprint examiner testified that he "did not develop any ridge detail on the surface of the knife." R. 121. The remaining three bodies––that of Mrs. Rohrs and of the Petersens––were found in various parts of the Petersens' house. Other than some overturned kitchen chairs and a tea kettle on the floor, there were again no signs of a struggle or disturbance. R. 123. All of the victims bore multiple stab wounds consistent with the knife found on the Rohrs' kitchen counter. R. 128–131.

After securing the scene, Sgt. Hoffman called the dispatcher on his car radio with instructions for additional officers. R. 56–57. Hoffman then went over to Officer Crawford's patrol car and asked Gary his name. Gary spelled his last name correctly and also gave his date of birth. R. 57–58. Hoffman described Gary as responsive to his questions and stated that he noticed "nothing really abnormal" about him, R. 59, and that Gary didn't do anything to indicate that he didn't know what was going on. R. 60. Hoffman asked no questions about what had happened inside the Rohrs or Petersen homes, R. 65, nor about what was in Gary's mind, R. 66, but on redirect examination the prosecutor elicited that Hoffman's opinion was that Gary knew he had done something wrong. R. 66.

York County Sheriff's Department Sgt. Marvin Bohon arrived at the scene a few minutes after 11:00 a.m. and transported Gary to the York County Detention Center where he was photographed in his bloodstained clothes, and then questioned. Like everyone who had contact with him in the hours following the killings, Bohon described Gary as cooperative and responsive to commands and questions. R. 96–98. At the Detention Center, Bohon witnessed an interrogation by Det. Sgt. Robert Hudgins, in which Gary

gave a somewhat tangential narrative of his trip from Indiana. Although Gary often shifted from Sgt. Hudgins' questions to the subject of his girlfriend, R. 103, Sgt. Hudgins was eventually able to elicit an account of the killings and the events leading up to them.

During the interview, Gary told Sgt. Hudgins that "he lost his mind and ended up in South Carolina." He said that he had heard voices in his head all the way down from Indiana telling him that his girlfriend was going to be dumped off in Tampa, Florida, and that she was going to become a whore. The purpose of his trip south was to find her. Defendant's Ex. 23, R. 334. Sgt. Hudgins' notes continue:

> Mr. Rimert spoke of feeling like he was possessed and felt like his grandparents were asking for it and that he felt like he was going to burn in hell if he did not do it. Mr. Rimert was ask [sic] if he did not do what? He advised, "Kill my grandparents and their next door neighbors."

Id. Gary gave a description of the killings which appears to have generally corresponded with the physical evidence, except for his assertion that he killed his grandfather at the next door neighbors' house. *See* R. 13 (Mr. Rohrs' body found in front room of his own house). Gary stated that he did not know why it had happened, but that he had been off his medication. "He said that he was real confused and that he was going to die laughing if he did not do it. Mr. Rimert then advised that he meant to kill everyone." Defendant's Ex. 23, R. 335. Gary also gave Sgt. Hudgins Tracy's name, date of birth, address and telephone number. Sgt. Hudgins noticed that Gary showed no emotion at all during the entire interview but stared directly at Hudgins with a fixed and expres-

sionless gaze which the officer found unnerving. R. 79; 90–91.

Following Gary's interview with Sgt. Hudgins, Officer Joe Smart read him a series of murder warrants. As Smart finished reading the second warrant, Gary asked, "What do I have to do to get out of this?" R. 109–110. Smart described Gary as "calm, very calm," R. 109, and "very calm, extremely calm." R. 111. Although Smart declined to characterize Gary's demeanor as abnormal, he acknowledged having been the first to sign the application for Gary's emergency commitment. R. 112–113.

After reading the warrants, Officer Smart transported Gary to the Piedmont Medical Center in Rock Hill for an evaluation of his need for hospitalization. The Medical Center records describe Gary as "calm and cooperative," but he admitted to hearing voices telling him, "Die you S.O.B.; pull it out of your ass." As in his statement to Sgt. Hudgins, Gary told the Medical Center staff that he thought the killings "would keep him from burning in hell." The emergency room notes continue:

> His affect was restricted, he was very guarded and seemed to be distracted by internal stimuli. Upon inquiry, he admitted to hearing voices. Pt. did not seem to grasp the reality of the situation. No apparent understanding or emotional connection.

Defendant's Ex. 29, R. 342–343.

Based on this evaluation, the York County authorities decided to proceed with hospitalization at the Hall Institute of the Department of Mental Health in Columbia. Gary was then returned to the Detention Center to be booked and transported to Columbia.

Just before Gary was placed in the patrol car, he asked

Sgt. Hudgins, "Can dead people be brought back to life?" R. 77. Hudgins was surprised by this question, since it came "out of the blue" and not as part of any conversation. R. 92–93. On the drive to Columbia, YCSD Officer Scott Bernard noted that Gary was "very calm and flat and unemotional," and that he even talked with Bernard about having recently visited with his grandparents. R. 106–107.

C. The State's psychiatric evaluation

Officers Bernard and Smart took Gary directly to the Forensic Unit of the William S. Hall Psychiatric Institute, where he would remain until his trial, fourteen months later. R. 156. At the time of his admission on Saturday evening, July 14, the forensic staff found Gary to be psychotic and "not in touch with reality." R. 158. Asked why he had been brought to the hospital, Gary responded, "Because I scared my grandparents." R. 158. He continued to be actively delusional over the next several days and revealed in several ways--including efforts to call his grandparents on the telephone--that he did not appreciate the reality of the Rohrs' deaths. R. 158–159. On admission Gary was immediately placed on antipsychotic medications, and over a period of two or three months his psychosis was gradually brought under control. R. 159.

Dr. Larry Montgomery, a psychiatrist and the Chief of the In-patient Services Unit of the Department of Mental Health's Forensic Services Unit, was the state's last witness. Dr. Montgomery explained that he and his staff had been ordered by the court to determine whether Gary was mentally ill, and if so, whether he had the capacity to know that his actions were wrong. Dr. Montgomery's conclusion was that there was "absolutely no doubt" but that Gary suffered from paranoid schizophrenia, R. 135, and that he did not have the ability to distinguish the wrongfulness of his acts at the time

he committed them. R. 135; 177. This opinion was emphatically supported by Dr. Donald Morgan, who participated in Gary's court-ordered evaluation in his capacity as Acting Director of the Hall Psychiatric Institute and who testified as a defense witness at trial. R. 213-215. Dr. Morgan concurred in the diagnosis of paranoid schizophrenia and testified that he did not believe "that there was any possibility that [Gary] could tell right from wrong" at the time of the homicides.

Dr. Montgomery and Dr. Morgan based their conclusions regarding Gary's criminal responsibility on their review of all of the state's evidence regarding the crimes, their clinical interviews, observation and psychiatric treatment of Gary at the hospital, and their review of his prior psychiatric history in Indiana. In addition, both doctors attended the entire trial and listened to all of the testimony from the state's witnesses. R. 160-161; 215-216. Dr. Montgomery described Gary's delusions and hallucinations as "very typical of the illness of paranoid schizophrenia," R. 161-162, and related in some detail the course of Gary's illness beginning prior to his hospitalization in Indiana. R. 165-173. He noted the evidence that Gary had been very psychotic at the time of his hospitalization and that he continued to hear voices during his stay at Home Hospital. R. 167-169. Dr. Montgomery also pointed to Gary's statements to his mother over the telephone just before the killings and his description of command hallucinations ordering him "to kill his grandparents or his soul would burn in hell." R. 172; 175-176. Significantly, these overwhelming command hallucinations, which Dr. Montgomery described as one of the most dangerous symptoms of paranoid schizophrenia, R. 175-176, seem to have been reinforced at the time of the homicides by akathisia, a painful side-effect of Gary's tranquilizing medication which produces "a sensation . . . of crawling or burning on the skin." In his psychotic state, Gary apparently

experienced this physical sensation as "burning in hell," R. 177–178, and it was inferable that this compounded the devastating power of his hallucinations.

Both doctors discussed at some length the various aspects of Gary's behavior following the crime as described by the police officers. Dr. Montgomery stressed that Gary's inappropriately emotionless and calm demeanor, far from constituting evidence of his sanity, "was really a symptom of a raging mental illness." R. 174. Explaining the physiology of this paradoxical sign of schizophrenia, Dr. Morgan told the jury that schizophrenia is a biological illness caused by a disturbance in the metabolism of the brain's frontal lobe. Because the frontal lobe is thc portion of the brain which adds emotional content to human activity and allows people to understand their surroundings in emotional terms, this disturbance of the frontal lobe's metabolic functioning produces in schizophrenics the eerie symptom of emotional vacuity––of "staring right through" people––which Officer Crawford noticed when he first saw Gary minutes after the killings, R. 25, and which Det. Sgt. Hudgins had found so strange during his interview with Gary two or three hours later. R. 219–220. Thus Gary's disconnected calm was actually not a sign of sanity at all, but powerful evidence of his inability to understand the significance of his actions. R. 220.

For somewhat the same reasons, Dr. Montgomery and Dr. Morgan did not view such details as Gary's compliance in obeying simple commands, his having washed the knife, or his having made an inappropriate remark during the arrest process as any evidence of his sanity with respect to the homicides. Both doctors stressed that even an acute psychotic episode such as the one which Gary was experiencing on July 14 does not bring memory or other functions to a complete halt. But while these aspects of consciousness "go in and out," Dr. Morgan stated that in assessing Gary's

responsibility, "the key thing . . . is that he was obeying voices which gave him no option." R. 220–221. Similarly, Dr. Montgomery testified that he took each of the aspects of Gary's behavior as described by the police into consideration, and that all of that behavior––his demeanor at the time of his arrest, his ready compliance with police commands, and his "weak attempts at humor"––were consistent with the conclusion that Gary was very psychotic and not criminally responsible. R. 174–175.

D. The prosecution's case

The prosecutor conducted almost no cross–examination of Dr. Montgomery after his recall by the defense, R. 178–179, and asked only four questions of Dr. Anderson. R. 189–190. As for Dr. Morgan, the prosecutor established only that he agreed with all of Dr. Montgomery's findings. R. 221. The state offered no rebuttal testimony, R. 222, and rested without presenting any expert testimony of any kind.

In his jury argument, the prosecutor repeatedly characterized the case as "tragic," stated that Gary deserved "compassion and sympathy," and assured the jury that "Gary Rimert is mentally ill and he will be dealt with by people that deal with people who are mentally ill." R. 290. The prosecutor then conceded that Gary had been unable to conform his conduct because of his mental illness and asked the jury to find him guilty but mentally ill. R. 292. However, he listed as evidence of sanity

- Gary's long drive from Indiana and his seeming normalcy when he gave his name to a security guard at the front gate of his grandparents' residential development, R. 289,

- his calm demeanor and cooperativeness

after the crimes, R. 287; 291,

- the washing of the knife, R. 289–290,

- his strange remark to Officer Smart about how to "get out of this," and

- his desperate phone calls before the killings, in which he begged his mother to come soon. R. 290.

E. Jury instructions and deliberations

The trial judge denied petitioner's motions for directed verdicts of not guilty by reason of insanity. In addition, he overruled petitioner's objection to submitting the alternative verdict of guilty but mentally ill, and also refused to strike "guilty" as a possible verdict, despite the prosecutor's concession that such a verdict was not supported by the evidence. R. 294; 312–313. Pointing to the prosecutor's misleading assurance to the jury that petitioner "will be dealt with by people that deal with people who are mentally ill," petitioner urged the trial judge to instruct the jury that South Carolina law provided for civil commitment of insanity acquittees, S.C. Code § 17–24–40 (1985), while a verdict of guilty but mentally ill mandated a sentence of life imprisonment. S.C. Code §§ 16–3–20(A), 17–24–70(A) (1985); *see* Defendant's Request to Charge on Effect of Jury's Verdicts; R. 234–236; 293–294, 349. The trial judge denied this request as well, and informed the jury only that the verdict of guilty but mentally ill "is not a defense [but] is a form of guilty verdict only." R. 303.

The jury deliberated for two hours and seventeen minutes before returning verdicts of guilty but mentally ill on all counts. R. 311; 321–323. The trial judge then sentenced

petitioner to four terms of life imprisonment.

Petitioner moved for a new trial. At a hearing on this motion, petitioner presented the testimony of a member of the trial jury, William B. Polk. Mr. Polk stated that after hearing the evidence, he concluded that petitioner "was insane when he committed these crimes." The examination continued:

> Q. And by insane, what do you mean by that?
>
> A. That he did not know what he was doing, right or wrong, I don't believe he knew between right or wrong at the time. . . . We voted mentally ill because we--well, just me, you said--I was told by saying [guilty but] mentally ill he would to a hospital or institution.
>
> * * *
>
> Q. Told by who?
>
> A. Just the people in the jury room.
>
> Q. Other members of the jury?
>
> A. Members of the jury.
>
> Q. Okay.
>
> A. That he would probably be in an institution. Like I said, I thought he was insane at the time he did these crimes and we deliberated for an hour and a half or two hours and it dawned on me that if he was insane at the

time there was a plea if not guilty that he would go free and he could do this again.

Mr. Polk reiterated that he believed at all relevant times that the proper verdict under the evidence was Not Guilty By Reason of Insanity, but he did not vote for that verdict because he understood from the other jurors that an NGRI verdict would allow petitioner "to go free." He continued:

> So it was told to me that if he was guilty, but mentally ill, he would be put in a hospital--we deliberated on this--and we thought he would be put into a hospital, which I think in my person[al] opinion that's what he needed, so that's when I changed my verdict that by going with guilty, but mentally ill he would be put into a hospital, which none of us knew what that meant though.
>
> * * *
>
> In other words, we were really passing a sentence, you know, which is wrong in my understanding, but I really think he was insane.
>
> Q. I see. If you had known that the result of a guilty, but mentally ill verdict is a prison sentence with a requirement of psychiatric treatment at the beginning or as needed and that the result of the not guilty by reason of insanity verdict is a commitment to the State Mental Hospital with no possibility of release until the court orders his release, a Criminal Court Judge, would your verdict have been the

same or different.

A. It would have been different.

Q. What would your verdict have been?

A. [Not] guilty by reason of insanity.

State v. Rimert, supra, Appendix to Motion to Supplement the Record, Tr. of Oct. 25, 1991 hearing, at 23–28. The trial judge ruled that this testimony was inadmissible as an attempt to impeach the jury's verdict and denied petitioner's post–trial motions.

F. Appeal to the South Carolina Supreme Court

On appeal, petitioner argued that the evidence of his sanity was insufficient to support the jury's GBMI verdicts. In response to his claim that the sufficiency question was governed by the federal due process standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), the respondent state of South Carolina argued at length that the *Jackson* standard was inapplicable because South Carolina placed the burden of proving insanity on the defendant and that affirmance was mandated by "any evidence" of sanity. Brief of Respondent at 1–10 ("The issue is . . . whether there was any evidence in the record from which the jury could have reasonably drawn the inference that Rimert, at the time of the stabbings, retained the capacity to distinguish the moral or legal wrongfulness of his actions."). Without addressing the standard of review, the state supreme court, over Justice Finney's dissent, held the evidence of sanity sufficient. *State v. Rimert*, 446 S.E.2d 400 (S.C. 1994).

Petitioner also renewed on appeal his claim that under the circumstances of this case, due process entitled him to

dispositional instructions regarding both the GBMI and NGRI verdicts. The South Carolina Supreme Court rejected these claims and affirmed, stating simply that "the consequences of a conviction do not aid the jury in their function which is to determine whether the defendant committed the offense," citing *State v. Poindexter*, 431 S.E.2d 254 (S.C. 1993). *State v. Rimert*, *supra*, 446 S.E.2d at 401.

Petitioner sought rehearing. In his petition, he alleged that the state court's opinion failed to reflect adherence to the *Jackson* sufficiency standard. He also pointed out that while this Court's intervening decision in *Shannon v. United States*, 114 S.Ct. 2419 (1994), had reaffirmed the traditional rule against charging juries on the consequences of its verdicts, *Shannon* was careful to note that such instructions might be necessary under certain circumstances--such as an inaccurate or misleading statement by a prosecutor during trial. 114 S.Ct. at 2428. Arguing that this case presented just such a situation, petitioner also moved to expand the record to include the post-trial testimony of juror Polk, which demonstrated that the lack of dispositional instructions had actually produced a miscarriage of justice. On July 29, 1994, the state court granted petitioner's motion to add Juror Polk's testimony to the record, but denied his petition for rehearing.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

As noted above, petitioner pressed both the sufficiency and instructional issues at trial, R. 137-48, 222-28, 234-36, 243-44, 349, and on appeal. In the South Carolina Supreme Court, he argued that the sufficiency of the evidence of sanity was subject to review under the federal due process standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), Brief of Appellant, *State v. Rimert*, *supra*, 17-18, 33-34, Reply Brief of Appellant at 1-2, and that the denial of his requested disposi-

tional instructions so undermined the reliability of the jury's fact-finding function as to deny him due process of law. *Id.*, Brief of Appellant at 36. The state supreme court denied both claims on their merits.

WHY THE WRIT SHOULD BE GRANTED

I. The Court Should Grant Review to Make Clear that the *Jackson* "Rational Trier of Fact" Test Applies to the Sufficiency of the Evidence Establishing Affirmative Defenses Such as Insanity

In *Moore v. Duckworth*, 443 U.S. 713 (1979), this Court squarely held that a federal habeas court, reviewing the sufficiency of the evidence adduced to establish a defendant's sanity, must apply the federal constitutional standard enunciated in *Jackson v. Virginia*, 443 U.S. 307 (1979). Disapproving the court of appeals' holding that a federal court's constitutional inquiry in such cases is limited to determining whether "'a state court conviction is totally devoid of evidentiary support'" *quoting Moore v. Duckworth*, 581 F.2d 639, 642 (7th Cir. 1978), the *Moore* Court established that the proper inquiry is "whether the record evidence could support a finding of guilt beyond a reasonable doubt." 443 U.S. at 714.

In this case, the state of South Carolina has argued with apparent success below that *Moore* and *Jackson* are wholly inapplicable because South Carolina places the burden of persuasion (by a preponderance of the evidence) upon the defendant who sets up insanity, whereas the Indiana statute at issue in *Moore* required the state to prove sanity beyond a reasonable doubt once the defendant presented evidence of insanity. But the allocation of the burden of proof affects only how, and not whether, the *Jackson* standard must be applied. Like Indiana, South Carolina places an evidentiary

obligation on the state once the defendant has met his burden of producing evidence of insanity. "[W]hen a defendant offers evidence of insanity, the State no longer enjoys the presumption [of sanity], *but must present evidence to the jury from which the jury could find the defendant sane.*" *State v. Smith*, 379 S.E.2d 287, 288 (S.C. 1989) (emphasis added). If the state produces no evidence at all, the defendant is entitled to a directed verdict of NGRI. *State v. Milian-Hernandez*, 336 S.E.2d 476 (S.C. 1985). But what if, as here, the state produces only a scintilla of evidence? Although the state supreme court never identified the standard of review that it was applying when it rejected petitioner's sufficiency claim, the court's opinion and the record as a whole strongly suggests that it went no further than to determine whether the record contained "any evidence" of sanity. Against the overwhelming weight of both expert and lay testimony, the court mentioned

- that a single one of several arresting officers stated without explanation that petitioner "knew he had done something wrong" when he was arrested for the killings;

- that petitioner had apparently partially rinsed off the knife while waiting, drenched in blood, for the police to arrive, and

- that he asked a bizarrely inappropriate question about "getting out of" the murder charges as the warrants were being read to him just before he was transported to the state mental hospital.

Whether these out-of-context bits of testimony constitute "any evidence" of sanity is a very different question

from whether, to any rational fact-finder, they could have been found to outweigh all of the evidence of insanity in this case. Petitioner does not claim that due process requires the prosecution to bear any burden of proof on the issue of sanity, *Leland v. Oregon*, 443 U.S. 790 (1952), nor that *Jackson* requires application of the reasonable doubt standard without regard to state law. *See Engle v. Isaac*, 456 U.S. 107, 119-20 (1982); *Martin v. Ohio*, 480 U.S. 228 (1987). But he does submit that within the parameters established by state law, due process is offended by the wholly arbitrary and necessarily irrational rejection of a valid insanity defense.

Thus the federal constitutional question presented here is whether the "any evidence" standard of *Thompson v. City of Louisville*, 362 U.S. 199 (1960), survives in this situation. If it does, due process would permit the lifelong imprisonment, as a guilty murderer, of one whom no rational trier of fact could have failed to find insane. Such fundamental unfairness cannot be the law, and the Court should grant certiorari in this case to say so.

II. The Court Should Grant Review to Ensure That the General Rule of *Shannon* Is Not Misapplied, as it Was Here, to Produce a Miscarriage of Justice.

The petitioner established by overwhelming evidence his lack of criminal responsibility. He was nevertheless convicted through what can only be described as a malfunctioning of the trial process. This case illustrates in the starkest possible way what happens when a jury is overloaded with fear and misinformation, and then deprived of legal information essential to permit it to focus on its task of impartially determining the facts.

In *Shannon v. United States*, 114 S.Ct. 2419 (1994), the Court affirmed the long-established general principle that juries in insanity cases need not be instructed on the conse-

quences of their verdicts. As the Court noted there, juries are already likely to be generally familiar with the concept of civil commitment of insanity acquittees, and the relatively short (40–day) mandatory commitment provided by federal law would in any event provide little assurance to a juror concerned about a mentally ill defendant's future dangerousness. 114 S.Ct. at 2427. Nevertheless, the Court cautioned that "an instruction of some form may be necessary under certain limited circumstances," such as, for example, where required to remedy a prosecutor's statement to the jury "that a particular defendant would 'go free' if found NGI." *Id.*, at 2429. The record of this case shows why such remedial instructions are sometimes constitutionally compelled, and that the prejudice from an unyielding adherence to the general rule against disposition instructions can be devastating indeed.

This case differs from *Shannon* in almost every material respect. First, the likelihood that the jury was already generally familiar with the effects of its verdicts is absent here, because this case involves a choice between "not guilty by reason of insanity" and the quite unfamiliar new verdict of "guilty but mentally ill." As the Utah Supreme Court observed in *State v. Shickles*, 760 P.2d 291, 297 (1988),

> Clearly, "guilty" and "not guilty" verdict forms require no special explanations to the jury. Jurors know that guilty verdicts in criminal cases subject defendants to possible imprisonment and fines. However, a verdict of guilty and mentally ill is new to our law, and its . . . functions and effect are not clear, either on its face or when compared with a verdict of not guilty by reason of insanity, especially since mental illness is a component of both verdicts.

> Furthermore, there is a popular misconception that a verdict of not guilty by reason of insanity means that the court loses the power to protect the public from a dangerous defendant.

Indeed, the injection of the new "guilty but mentally ill" verdict is inherently misleading because it suggests by its terms a dispositional scheme that does not in fact exist. Juror Polk's assumption--that a GBMI verdict would produce a therapeutic commitment to a mental hospital, while NGRI meant freedom and the risk of another tragedy--is the assumption that any uninstructed juror would likely make, based on the wording of the verdicts themselves. Because it would seem unlikely that a "guilty but mentally ill" defendant would be sentenced exactly like a "guilty" one, jurors will naturally make the logical leap that petitioner's own jury did, which is to assume that a GBMI defendant will be treated as mentally ill even though he is guilty. And having made the assumption that GBMI leads to hospitalization, the next logical step is to conclude, as petitioner's jury did, that a NGRI verdict simply means freedom.

Second, unlike in *Shannon*, the prosecutor here encouraged this erroneous series of conclusions when, professing compassion for petitioner, he asked the jury to return a GBMI verdict while assuring it that "Gary Rimert is mentally ill and he will be dealt with by people that deal with people who are mentally ill." R. 290. Despite this assurance, the prosecutor knew, as the jury did not, that

> 1) a verdict of guilty but mentally ill (GBMI) would actually require imposition of four mandatory life prison sentences, S.C. Code §§ 16-3-20(A), 17-24-70(A) (1985), and

> 2) an acquittal by reason of insanity (NGRI) would place petitioner under the permanent jurisdiction of the criminal court, and could not lead to his release until he had been first committed to a facility of the South Carolina State Hospital, and until a circuit court judge had found him to be no longer in need of hospitalization. S.C. Code § 17-24-40 (1985).

The trial judge refused appellant's request to explain the true effects of the GBMI and NGRI verdicts, and adhered to this refusal even after the solicitor's misleading insinuation that a verdict of guilty but mentally ill would yield a therapeutic result. R. 293-294. The jury thus retired to decide appellant's fate without ever having been told that an acquittal by reason of insanity would not result in his unsupervised release back into society, nor that a verdict of guilty but mentally ill required an automatic sentence of life imprisonment in a state correctional facility. On the contrary, the jury's only "information" on all of these points was the prosecutor's suggestion that a verdict in favor of the state would result in a therapeutic disposition.

Third, the 120-day mandatory commitment procedure governing South Carolina NGRI acquittees is substantially more stringent than was the federal statutory commitment procedure about which the defendant wished the jury instructed in *Shannon*. The federal statute in *Shannon* requires an initial pre-hearing commitment for not more than 40 days, after which the court must hold a hearing. 18 U.S.C. § 4243(c). If the defendant is further committed as a result of this hearing, the court may subsequently release him without a further hearing upon the recommendation of the hospital to which he is committed, or else may release him after a new hearing if either the court or the government desires one.

§ 4243(f). Under S.C. Code Ann. § 17-24-40 (1985), by contrast, the initial maximum mandatory commitment is 120 days--three times longer than that permitted by the federal statute. The state circuit court thereafter may not order the acquittee's release so long as he remains mentally ill and *either* lacks insight to make responsible treatment decisions *or* poses "a likelihood of serious harm to himself or others." S.C. Code Ann. § 44-17-580 (1985). Even when an insanity acquittee is finally released, the court retains lifelong jurisdiction over him. S.C. Code Ann. § 17-24-40. In this case, given that the state's own psychiatrist, testifying in support of petitioner's insanity defense, had cautioned that his schizophrenic illness was lifelong and would require many years of hospitalization, R. 176, a jury informed of this commitment procedure would have had every reason for confidence that an NGRI verdict would not result in the immediate release of a dangerously mentally ill person.

A fourth factor differentiating this case from *Shannon* is that the evidence itself virtually guaranteed that the jury's deliberations would focus on the question of release. Unlike in *Shannon*, where the defendant was charged only with a firearms violation and where the only precipitating act of violence was his suicide attempt, 114 S.Ct. at 2423, the evidence in this case conclusively established:

> • that petitioner suffered from a serious and incurable mental illness, paranoid schizophrenia,
>
> • that this illness had without any warning caused him to commit horrific acts of violence against four elderly people,
>
> • that the killings had occurred almost immediately after his premature discharge from the

psychiatric ward of a hospital,

- that he would continue to be afflicted with his severe mental illness for the rest of his life, and

- that he required longterm psychiatric hospitalization.

Given this evidence alone, it is almost inconceivable that the jury would have ignored the potentially grave consequences--real or imagined--of its verdict. The irony of cases such as this one is that the more powerful the evidence of legal insanity--and in this case the evidence was overwhelming and virtually uncontradicted--the more likely that an uninstructed jury will be deflected from its proper role by fear of the consequences of an NGRI verdict.

Finally, unlike in *Shannon*, the post-trial testimony of juror Polk removes any basis for doubting the prejudicial effect of the jury's ignorance on this critical issue. Quite simply, the record shows not merely a "reasonable likelihood" that the jury was deflected from its fact-finding role by fear of petitioner's premature release, *see Boyde v. California*, 494 U.S. 370 (1990), but that the verdict *actually was produced* by this fear rather than by the evidence. As juror Polk candidly acknowledged, his verdict was not a verdict on guilt or innocence at all, but a misguided and misinformed "sentence" based on the jury's suppositions about which disposition would best protect society.[2]

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[2]Petitioner recognizes that such evidence and testimony might well be deemed inadmissible in both South Carolina and federal courts as violative of the rule against impeachment of a juror's own verdict. *See Tanner v. United States*, 483 U.S. 107, 117-127 (987); Fed. R. Evid. 606(b). However, in this case the state of South Carolina expressly acceded to

While states are free to impose a heavy burden of proof on defendants pleading insanity, *Leland v. Oregon*, *supra*, and possibly even to abolish the insanity defense altogether, *State v. Cowan*, 861 P.2d 884 (Mont. 1993), *cert. denied*, 113 S.Ct. 1371 (1994), due process will not permit a state that retains the defense of insanity to allow juries to nullify it arbitrarily. Having recognized the *M'Naghten* insanity standard, South Carolina created a constitutionally protected liberty interest in a reasoned determination of whether a defendant was in fact insane at the time of the offense. *See Hicks v. Oklahoma*, 447 U.S. 343 (1980). That interest was extinguished here by the wholly predictable fears of an uninstructed jury. The result was little better than if petitioner had been denied any trial at all: he was permitted to present his overwhelming case of insanity to a jury, but under circumstances that virtually guaranteed its rejection for reasons unrelated to its merit. The general rule exemplified by *Shannon* is intended to safeguard the reliability of jury verdicts in insanity cases. Its inflexible application here had the opposite effect, and produced a constitutionally intolerable miscarriage of justice.

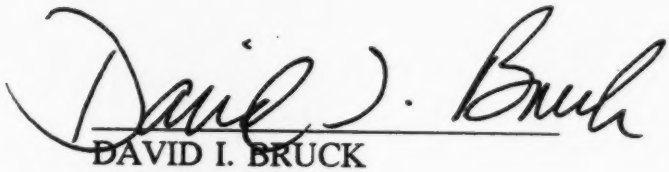
---

petitioner's motion to supplement the appellate record with Juror Polk's testimony, *State v. Rimert*, Letter of Counsel for Respondent to the Clerk of the South Carolina Supreme Court (July 12, 1994), and the state court granted the motion. *Infra*, at A-7. Since the admissibility of such evidence is obviously controlled by state law, the state supreme court's action removes any bar to the consideration of Juror Polk's testimony here.

CONCLUSION

For the foregoing reasons, petitioner submits that the Court should grant the writ.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

October 28, 1994

THE STATE OF SOUTH CAROLINA
In The Supreme Court

State of South Carolina,

Respondent,

v.

Gary Allen Rimert,

Appellant.

Appeal From York County
Paul E. Short, Jr., Judge

Opinion No. 24093
Heard April 5, 1994 – Filed June 13, 1994

AFFIRMED

David I. Bruck, of Columbia; and David G. Belser, of Asheville, N.C., for appellant.

Attorney General T. Travis Medlock, Chief Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General Harold M. Coombs, Jr., and Assistant Attorney General Alexandria Broughton Skinner, all of Columbia, and Solicitor Larry F. Grant, of York, for respondent.

Moore, A.J.: Appellant was found guilty but mentally ill (GBMI) on four counts of murder and sentenced to four concurrent life sentences. We affirm.

FACTS

In June 1990 appellant was hospitalized and diagnosed as a paranoid schizophrenic in Indiana where he lived with his parents. On July 11, 1990, he was released from the hospital in Indiana although he was actively hallucinating. He left his medication in Indiana and drove all night to his grandparent's house near Rock Hill.

Shortly after arriving at his grandparent's house, appellant killed his grandparents and their neighbors by stabbing them with a kitchen knife. Appellant pled not guilty by reason of insanity (NGBRI).

ISSUES

1) Did the trial judge err in denying appellant's motion for a directed verdict?

2) Did the trial judge err in denying appellant's motion

to charge the jury on the disposition of defendants found NGBRI and those found GBMI?

3) Did the trial judge err in submitting possible verdicts of guilty and GBMI?

DISCUSSION

1) Directed Verdict Motion

Appellant moved for a directed verdict of NGBRI on the ground the evidence did not support a finding of sanity. The trial judge held there was some evidence of sanity. Appellant citing *State v. Milian-Hernandez*, 287 S.C. 183, 336 S.E.2d 476 (1985), argues the trial judge should have granted a directed verdict because the State did not present sufficient evidence that appellant was sane. We disagree.

In *Hernandez*, the State relied on the presumption of sanity and the permissible inference of flight as evidence of sanity. We found the presumption of sanity itself does not create a jury issue and the circumstances of Hernandez's flight negated the permissible inference of flight. We then concluded the State had not presented any evidence of sanity.

Here, there was testimony from an officer who arrived on the crime scene shortly after the murders that appellant knew he had done something wrong . Further, the State presented other evidence of sanity, including that appellant washed off the knife and questioned how he could "get out of this." There was sufficient evidence of appellant's sanity and the trial court did not err in denying his motion for a directed verdict. *Poindexter, supra; State v. Prince*, Op. No. 23965 (S.C. Sup. Ct. filed December 13, 1993)(Davis Adv. Sh. No. 30 at 8).

2) Jury Charge on Effect of GBMI and Guilty Verdicts

Appellant argues the trial judge should have instructed the jury on the effect of GBMI and NGBRI verdicts. Appellant argues that for all practical purposes guilty and GBMI verdicts are the same and the jury should have been informed of this fact and further informed that a verdict of NGBRI would have led to appellant's hospitalization until a court order released him. Appellant contends these instructions were necessary because during closing argument the solicitor misled the jury by stating appellant would be "dealt with by people who deal with people who are mentally ill."

The trial court ruled that even though appellant did not make a contemporaneous objection to the solicitor's closing argument, he would give the jury a curative instruction that sentencing was of no concern to them. *State v. Huiett*, 271 S.C. 205, 246 S.E.2d 862 (1978)(instruction on post-verdict dispositions is proper to cure a misstatement of law). Appellant refused this charge. Appellant argues the offered instruction was not curative and instructions on the effects of the verdicts were the only instructions which could have cured the solicitor's comments. We disagree.

This issue was also addressed in *Poindexter, supra*. In *Poindexter* we held the consequences of a conviction do not aid the jury in their function which is to determine whether the defendant committed the offense. Therefore, this argument is without merit.

3) Submission of guilty and GBMI verdict forms

The trial judge submitted the following verdicts to the

jury: guilty, not guilty, NGBRI, and GBMI. Appellant argues the trial judge erred in submitting the verdict form of guilty. Appellant's argues there was no evidence to support a guilty verdict and submission of it violated his due process rights and prejudiced him because it led to a compromise verdict of GBMI.

S.C. Code Ann. § 17-24-30 (Supp. 1993) provides:

> In a prosecution for a crime when the affirmative defense of insanity is raised sufficiently by the defendant, or when sufficient evidence of a mental disease or defect of the defendant is admitted into evidence, the trier of fact shall find under the applicable law, and the verdict *must* so state, whether the defendant is:
>
> (1) guilty;
> (2) not guilty;
> (3) not guilty by reason of insanity; or
> (4) guilty but mentally ill.

(emphasis added). We hold this section requires the submission of all four of these verdict forms. *State v. Wilson*, 306 S.C. 498, 413 S.E.2d 19 (1992)("must" is mandatory). Additionally, there was evidence appellant was legally sane and, therefore, the jury could have found him guilty.

Appellant then argues he could waive the GBMI verdict form because there is no practical difference between guilty and GBMI and by submitting all of the verdict forms, the jury reached a compromise verdict of GBMI.[1] Since we hold all

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[1]On appeal, appellant seems to be attacking the constitutionality of the GBMI verdict itself. This issue was not raised nor ruled on below and is therefore barred. *State v. Williams*, 303 S.C. 410, 401 S.E.2d 168 (1991).

four verdict forms in § 17-24-30 must be submitted, appellant cannot waive a GBMI verdict form once he has raised the issue of sanity. *See People v. Ritsema*, 105 Mich.App. 602, 307 N.W.2d 380 (1981)(GBMI verdict must be submitted because statute mandates it and it cannot be waived by defendant). Therefore, this argument is also without merit.

AFFIRMED.

Chandler, A.C.J., TOAL, A.J., and Acting Associate Justice William H. Ballenger, concur. FINNEY, A.J., dissenting in separate opinion.

FINNEY, A.J., DISSENTING: I respectfully dissent. In my opinion, appellant was entitled to a directed verdict of not guilty by reason of insanity (NGBRI).

A defendant is NGBRI if, *at the time of the commission of the act*, he, as the result of mental disease or defect, lacks the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong. S.C. Code Ann. § 17-24-10(A)(Supp. 1993). Here, the majority relies on three pieces of evidence which allegedly negate appellant's showing of insanity: (1) a police officer's testimony that, shortly after the killings, appellant looked like he knew he had done something wrong; (2) the finding of a knife which appellant could have washed, which could have been used to stab the victims; and (3) appellant's question, hours after the deaths, as he was being read the warrants, how he "could get out of this". Viewed in context, none of this evidence is sufficient to present a jury issue on appellant's sanity. *Compare State v. Milian-Hernandez*, 287 S.C. 183, 336 S.E.2d 476 (1985) (apparent evidence of sanity not inconsistent with appellant's insanity defense).

THE SUPREME COURT OF SOUTH CAROLINA

July 29, 1994

David I. Bruck, Esquire
P.O. Box 11744
Columbia, S.C. 29211

Re: The State v. Gary Allen Rimert

Dear Mr. Bruck:

The Court has issued the following Order on your Motion to Supplement the Record:

"Motion to Supplement the Record is granted.

s/ A. Lee Chandler, C.J.
For the Court
Waller, A.J., not participating

July 29, 1994."

The Court has also issued the following Order on your Petition for Rehearing:

"Petition for Rehearing is denied.

s/ A. Lee Chandler, C.J.
s/ Jean H. Toal A.J.
s/ James E. Moore A.J.

"I would grant.

s/ Ernest A. Finney, Jr. A.J.

July 29, 1994."

The remittitur in this matter is today being forwarded to the Clerk of Court for York County.

Very truly yours,

s/Clyde N. Davis, Jr.
Clerk

CHAPTER 24

Mentally Ill or Insane Defendants

§ 17-24-10. Affirmative defense.

(A) It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong.

(B) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.

(C) Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to establish the defense of insanity.

§17-24-20. Guilty but mentally ill; general requirements for verdict

(A) A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10-(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.

(B) To return a verdict of "guilty but mentally ill" the burden of proof is upon the State to prove beyond a reasonable doubt to the trier of fact that the defendant committed the

crime, and the burden of proof is upon the defendant to prove by a preponderance of evidence that when he committed the crime he was mentally ill as defined in subsection (A).

(C) The verdict of guilty but mentally ill may be rendered only during the phase of a trial which determines guilt or innocence and is not a form of verdict which may be rendered in the penalty phase.

(D) A court may not accept a plea of guilty but mentally ill unless, after a hearing, the court makes a finding upon the record that the defendant proved by a preponderance of the evidence that when he committed the crime he was mentally ill as provided in Section 17-24-20(A).

§17-24-30. Form of verdict.

In a prosecution for a crime when the affirmative defense of insanity is raised sufficiently by the defendant, or when sufficient evidence of a mental disease or defect of the defendant is admitted into evidence, the trier of fact shall find under the applicable law, and the verdict must so state, whether the defendant is:

(1) guilty;
(2) not guilty;
(3) not guilty by reason of insanity; or
(4) guilty but mentally ill.

§17-24-40. Commitment of defendant found not guilty by reason of insanity.

(A) In the event a verdict of "not guilty by reason of insanity" is returned, the trial judge shall order the defendant committed to the South Carolina State Hospital for a period not

to exceed one hundred twenty days. During that time an examination shall be made of the defendant to determine the need for hospitalization of the defendant pursuant to the standards set forth in §44-17-580 of the 1976 Code.

(B) A report of the findings shall be made to the chief administrative judge of the circuit in which the trial was held, the solicitor, the defendant, and the defendant's attorney.

(C) (1) Within fifteen days after receipt of this report by the court, the chief administrative judge of the circuit in which the trial was held shall hold a hearing to decide whether the defendant should be hospitalized pursuant to the standard of §44-17-580 of the 1976 Code.

(2) (a) If the chief administrative judge finds the defendant not to be in need of hospitalization, he may order the defendant released upon such terms or conditions, if any, as he shall deem appropriate for the safety of the community and the well-being of the defendant.

(b) In the event the chief administrative judge finds the defendant to be in need of hospitalization, he shall order him committed to the South Carolina State Hospital.

(c) If at a later date it is determined by officials of the State Hospital that he defendant is no longer in need of hospitalization, they shall notify the chief administrative judge, the solicitor, the defendant, and the defendant's attorney. Within twenty-one days after the receipt of this notice the chief administrative judge, upon notice to all parties, shall hold a hearing to

determine whether the defendant is in need of continued hospitalization pursuant to the standard of §44-17-580 of the 1976 Code. If the finding of the court is that the defendant is in need of continued hospitalization, it shall order his continued confinement. If its finding is that the defendant is not in need of continued hospitalization, it may order the defendant released upon such terms and conditions, if any, as the chief administrative judge shall deem appropriate of the safety of the community and the well-being of the defendant.

(D) Any terms and conditions imposed by the chief administrative judge shall be therapeutic in nature, not punitive. Therapeutic terms shall include, but not be limited to, requirements that the defendant:

(1) continue taking medication for an indefinite time and verify in writing the use of medication;

(2) receive periodic examinations and reviews by psychiatric personnel;

(3) report periodically to the probation office for an evaluation of his reaction to his environment and his general welfare.

(E) The chief administrative judge of the circuit in which the trial was held shall at all times have jurisdiction over the defendant for the purposes of this chapter.

§17-24-50. Length of confinement or supervision of defendant found not guilty by reason of insanity.

In no case shall a defendant found not guilty by reason of insanity be confined or be under supervision longer than the maximum sentence for the crime with which he was charged without full civil commitment proceedings being held.

§17-24-60. Petition by attorney of defendant found not guilty be reason of insanity.

Two years from the date of commitment the defendant's attorney may petition the chief administrative judge to be relieved as counsel.

§17-24-70. Sentencing of defendant found guilty but mentally ill.

If a verdict is returned of "guilty but mentally ill" the defendant must be sentenced by the trial judge as provided by law for a defendant found guilty, however:

(A) If the sentence imposed upon the defendant includes the incarceration of the defendant, the defendant must first be taken to a facility designated by the Department of Corrections for treatment and retained there until in the opinion of the staff at that facility the defendant may safely be moved to the general population of the Department of Corrections to serve the remainder of his sentence.

(B) If the sentence includes a probationary sentence, the judge may impose those conditions and restrictions on the release of the defendant as the judge considers necessary for he safety of the defendant and the community.

Supreme Court, U.S.
FILED
DEC 1 1994
OFFICE OF THE CLERK

(2)

No. 94-800

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

GARY ALLEN RIMERT,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

Did the South Carolina Supreme Court violate due process when it held there was sufficient circumstantial evidence to support the jury's finding, implicit in its four verdicts finding Rimert guilty but mentally ill, that Rimert failed to meet his burden of proving he did not know right from wrong at the time he killed four people?

II.

Did the South Carolina Supreme Court violate due process when it affirmed the trial court's denial of Rimert's request to charge the jury regarding the sentencing consequences of its verdict?

No. 94-800

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

GARY ALLEN RIMERT,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the State of South Carolina, urges this Court to deny Rimert's Petition for Writ of Certiorari.

OPINION BELOW

The opinion below is reported as *State v. Rimert*, ___ S.C. ___, 446 S.E.2d 400 (1994).

STATEMENT OF THE CASE

Gary Rimert stabbed four people to death with a kitchen knife. He told a policeman who responded to an emergency call that he "meant to kill everyone." (R. p. 76). Rimert was indicted and tried by a jury for the murders of Dee Petersen, Ralph Petersen, Alice Rohrs, and Henry Rohrs. The Rohrs were his grandparents. At his trial, Rimert asserted he was not guilty by reason of insanity (NGRI).

Rimert admittedly suffers from a mental disease, paranoid schizophrenia. However, there was conflicting evidence on the issue whether he could distinguish right from wrong.[1] Expert witnesses testified Rimert did not know his actions were wrong at the time he committed the homicides. (R. pp.

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[1]The inability to tell right from wrong is the distinguishing feature of insanity. S. C. Code § 17-24-10 (A), as compared with verdict of guilty but mentally ill. §17-24-20. State law in this regard is discussed in the argument portion of this brief.

340, 382, 424, 426). On the other hand, the trial court found there was circumstantial evidence in the record from which the jury could infer that Rimert knew right from wrong at the time of the homicides. On the basis of this circumstantial evidence, the trial judge denied Rimert's motion for a directed verdict of not guilty by reason of insanity (NGRI).[2] The South Carolina Supreme Court affirmed this ruling, a decision Rimert alleges deprived him of due process.

At trial, Rimert also attempted to waive submission of the possible verdict of guilty but mentally ill (GBMI) verdict to the jury. The trial court, and the state supreme court on appeal, held the submission of GBMI was required by statute whenever insanity was presented as a defense. That issue is not pursued in this petition.

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[2]The particular evidence is enumerated in the argument portion of this brief.

Rimert also requested that the jury be charged the sentencing consequences of the verdicts of not guilty by reason of insanity (NGRI) and guilty but mentally ill (GBMI) verdicts. (R. p. 349). The trial court denied this request, a ruling the South Carolina Supreme Court upheld on appeal. In this petition, Rimert alleges the trial court's refusal to charge the jury on the sentencing consequences of its verdict was a denial of due process.

In addition to alleging the general failure to charge sentencing consequences deprived him of due process, Rimert alleges the charge was necessary to cure allegedly improper representations in the Solicitor's closing argument. During closing argument to the jury, the Solicitor argued:

> How do you deal with a person who is mentally ill? That's not the issue that we are here to face. It's not a part of your concern. Gary Rimert is mentally ill and he will be dealt with by people that deal with people who are mentally ill. Your concern and your

> decision is he responsible for what he did criminally under the law . . . [emphasis supplied].

(R. p. 290, lines 20-25). There was no contemporaneous objection to this argument, but the trial court nevertheless offered to give a curative charge. The Court offered to charge the jury that sentencing was "of no concern to them." Rimert expressly refused the offer of this curative charge. (R. pp. 293, 294).

The jury returned verdicts of GBMI on each of the four murder charges. The trial court sentenced Rimert to four life sentences, to be served concurrently. Rimert appealed.

On appeal Rimert argued, "the jury's verdict that appellant was criminally responsible at the time of the offense is without evidentiary support." (App. Br. p. i). The South Carolina Supreme Court disagreed, finding there was sufficient evidence that Rimert knew right from wrong

to submit the issue to the jury. Justice Moore, writing for four of five members of the South Carolina Supreme Court, wrote:

> Here, there was testimony from an officer who arrived on the crime scene shortly after the murders that appellant knew he had done something wrong. Further, the State presented other evidence of sanity, including that appellant washed off the knife and questioned how he could "get out of this." There was sufficient evidence of appellant's sanity and the trial court did not err in denying his motion for a directed verdict. [citations omitted].

446 S.E.2d at 401.

Rimert also argued in the state supreme court that, "[u]nder the circumstances of this case, the trial judge should have informed the jury of the legal consequences of their verdicts." (App. Br. p. ii). The appellate court squarely rejected this argument, holding instead, "the consequences of a conviction do not aid the jury in their function which is to determine whether the defendant committed the offense." 446 S.E.2d at 401.

Although Rimert asserted on appeal, ancillary to his argument on this second issue, that the Solicitor had opened the door to a charge on the sentencing consequences when he argued Rimert would be "dealt with by people that deal with people who are mentally ill," the S.C. Supreme Court did not reach the issue. The Court's opinion implies that not only did it consider the issue procedurally barred, but also that the curative charge as offered and refused was adequate. On this issue the opinion noted:

> The trial court ruled that even though appellant did not make a contemporaneous objection to the solicitor's closing argument, he would give the jury a curative instruction that sentencing was of no concern to them. *State v. Huiett*, 271 S.C. 205, 246 S.E.2d 862 (1978)(instruction on post-verdict dispositions is proper to cure a misstatement of law). Appellant refused this charge. Appellant argues the offered instruction was not curative and instructions on the effects of the verdicts were the only instructions which could have cured the solicitor's comments. We disagree.

446 S.E.2d at 401.

SUMMARY OF ARGUMENT

Since the law of South Carolina places the burden of proving insanity on a defendant, as an affirmative defense, it was not a violation of due process when the S.C. Supreme Court upheld a jury's determination of guilt, a factual conclusion based on circumstantial evidence which supported an inferene Rimert knew right from wrong when he killed four people.

Since under the law of South Carolina a jury making a determination of guilt or innocence has no authority over sentencing, it was not a violation of due process for the trial judge to deny Rimert's request to charge the sentencing consequences of the verdicts of not guilty by reason of insanity (NGRI) and guilty but mentally ill (GBMI).

Because a jury with no authority to determine sentence is not to be concerned with the sentencing consequences of its decision, because the Solicitor's closing

argument to the jury did not misstate the law, and because Rimert declined the trial court's offer of a curative charge, it was not a violation of due process for the S.C. Supreme Court to rule that it was not error for the trial court to fail to charge the sentencing consequences of an insanity verdict.

Although the State did not object to inclusion in the Record on Appeal of a juror's attempt to impeach his verdict, the State expressly refused to accede to any positions or legal conclusions advanced by Rimert as the basis for his request to include the matter in the Record. In this respect, Rimert has misrepresented the State's position.

ARGUMENT I

THE SOUTH CAROLINA SUPREME COURT DID NOT VIOLATE DUE PROCESS WHEN IT RULED THE EVIDENCE, VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, WAS SUFFICIENT TO SUPPORT THE JURY'S CONCLUSION THAT RIMERT KNEW RIGHT FROM WRONG WHEN HE KILLED FOUR PEOPLE.

This issue is controlled by *Leland v. Oregon*, 443 U.S. 790 (1952), because under South Carolina state law a defendant bears the burden of proving insanity, as an affirmative defense, by a preponderance of the evidence. *See* Section 17-24-10, Code of Laws of South Carolina, Cum Supp. 1993 (governs insanity defense). *Leland* held it is not a violation of due process for a state law to allocate the burden of proving insanity to a defendant. The South Carolina Supreme Court did not ignore the requirements of *Jackson v. Virginia*, 443 U.S. 307 (1979), as Rimert argues. Rimert simply failed to meet his burden of proving

insanity to the jury.

To prove insanity under South Carolina state law, a defendant must show not only that he had a mental disease or defect, but also that he lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong. Section 17-4-10, *supra*. If a defendant proves he suffers from a mental disease or defect but he nevertheless retained the ability to discern right from wrong, he is guilty but mentally ill rather than insane. *See* Section 17-24-20(A), Code of Laws of South Carolina, Cum. Supp. 1993 (governs GBMI). The jury's verdict finding Rimert guilty but mentally ill indicates the jury found that, although Rimert suffered from a mental disease or defect, he knew right from wrong at the time of the killings.

Seeking review by this Court, Rimert rails against his standard of proof on the

issue of insanity. He argues, essentially, that where circumstantial evidence conflicts with expert testimony, the jury is bound by the conclusions of the expert witnesses. He urges that any other rule would violate *Jackson v. Virginia, supra.* Rimert's argument is meritless.

There are two divergent views concerning the legal effect of insanity. One view, adopted as federal common law, is that sanity itself is a component of the mental state required for the existence of criminal intent. *See Davis v. United States*, 160 U.S. 469 (1895). Under such a view, when insanity is raised as a defense the government bears the burden of proving the existence of sanity beyond a reasonable doubt. *Moore v. Duckworth*, 443 U.S. 713 (1979). There is, however, a second view of insanity, and it is this second view which represents the law of insanity in South Carolina.

In South Carolina, although a mental condition may affect the existence of the *mens rea*, is not assumed to do so. Following from this view, insanity in this state is an affirmative defense, introduced by a special plea and decided by a special verdict; and the burden of proving insanity rests upon the defendant. S.C. Code §17-24-10. Allocation of the burden of proof in this manner does not violate due process. *Leland v. Oregon*, 443 U.S. 790 (1952).

The Oregon law governing insanity is similar to the law of South Carolina in that the burden of proving insanity rests upon the defendant. In *Leland*, this Court held that the state of Oregon's requirement that a defendant asserting the defense of insanity must prove that defense beyond a reasonable doubt did not violate due process. Because in Oregon sanity was not an element of the crime of murder, this Court reasoned that Oregon's rule did not

relieve the State from proving all of the necessary elements of guilt beyond a reasonable doubt.[3] Similarly in this case, allocation of the burden of proving insanity as an affirmative defense did not relieve the state from its burden of proving every element of its case under the reasonable doubt standard. For this reason, and contrary to the argument by Rimert, there was no violation in this case of the *Jackson v. Virginia*[4] standard of proof.

Under the law of South Carolina, if there was any evidence of guilt, the trial

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[3]*Id.; see also Mullaney v. Wilbur*, 421 U.S. 684 (1984)(Rehnquist and Burger, explaining *Leland* in concurrence); *Foucha v. Louisiana*, ___ U.S. ___, 112 S.Ct. 1780 (1992)(Kennedy, explaining *Leland* in dissent); W. LaFave & A. Scott, Jr., 1 Substantive Criminal Law §4.1(b), pp. 429-430 (1986).

[4]*Jackson v. Virginia*, 443 U.S. 307 (1979), held that the relevant question as to the sufficiency of evidence is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

judge was obligated to submit the issue to the jury.[5] The evidence which could have supported the inference of malice was summarized at pages 10 -12 of Respondent's brief in the appeal before the state supreme court:

A. Evidence that Rimert was discharged from a mental hospital on Wednesday before the Saturday killings implied that some physician made a determination that he was not dangerous to himself or others. (R. p. 162). This determination might have included assessment of Rimert's capacity to know right from wrong.

B. Evidence that his parents allowed

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[5]*State v. Robinson*, ___ S. C. ___, 426 S.E.2d 317 (1993)(in considering a motion for a directed verdict, the judge is concerned with the existence or non-existence of evidence, not with its weight, and the case should be submitted to the jury if there is any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly or logically deduced).

Rimert access to the family car implies his parents did not consider him criminally delusional or dangerous. (R. pp. 200, 170).

C. Evidence that his parents did not notify the police when he was missing with a car implies they thought he was at least marginally rational. (R. p. 201, 170).

D. Evidence that he was capable of driving from Indiana to his grandparents' home in South Carolina indicates he had significant control of his mental faculties (R. pp. 201 - 202).

E. Evidence that his parents did not warn his grandparents of any ominous mental state implies they did not consider him to be under the dominion of command hallucinations. (R. p. 203).

F. Evidence that the guard at the River Hills housing development gate did not notice anything abnormal about Rimert

implies he was acting coherently when he went to his grandparents' that morning.(cf. tr. pp. 3-5).

G. Evidence that Rimert called his mother and asked her to come immediately, saying, "when are you coming down, can you be here any sooner", (R. 205), indicates that Rimert knew his thoughts were not right.

H. Evidence that he killed the only possible eyewitnesses to his grandparents' deaths could indicate he was aware of the culpability of his conduct.

I. Evidence that he washed the knife could imply that Rimert had an awareness that his conduct had been wrongful. (R. pp. 120 - 121).

J. Evidence he did, in fact, know his grandparents were dead (R. p. 40; Defendant's Exhibit 23) indicates Rimert was in touch with the reality of

the situation, and this also conflicts with expert testimony indicating it took several months for Rimert to understand that his grandparents were actually dead. (R. pp. 158, 159).

K. Evidence that Rimert himself was surprised by his actions, as when he told officer Hudgens he felt like he was possessed (R. p. 74), and that he was "speechless" and felt like "arrest me please" (R. p. 75) indicates Rimert knew the behavior he had just engaged in was wrongful.

L. Evidence that he seemed calm and coherent after the murders, followed instructions, and did as he was told (R. pp. 8, 69, 96 - 100, 105, 108 - 111) could be viewed as evidence of sanity, although this view admittedly would conflict with the expert testimony of Dr. Morgan. (R. pp. 219, 220).

M. Evidence that Rimert, although calm and coherent, exhibited facial expressions (R. p. 65) contradicts expert testimony to the effect that one of the symptoms of Rimert's schizophrenia was lack of affect or emotion (R. pp. 219, 220).

N. Evidence that Rimert appeared to understand and respond to questions by police, and even to carry on a conversation with them, indicates his mental faculties were not impaired to the point of hindering verbal communication. (R. pp. 60, 78, 98 - 100, 105, 108, 111).

O. Evidence that he knew he was in trouble, as when he asked, "What do I have to do to get out of this" (R. p. 110) indicated that at least very close in time to the murders Rimert understood that he had done something wrong.

P. Lack of any observation by lay

observers who saw him that day of any behaviors which indicated Rimert was responding to internal stimuli or otherwise hearing voices (Eg. R. p. 78) indicates he may not have been as actively psychotic in the presence of casual observers as he was in the presence of mental health personnel, who observed him to be "very psychotic" and "hearing voices". (R. pp. 157, 158).

As the South Carolina Supreme Court stated in *State v. Milian-Hernandez*, 287 S.C. 183, 336 S.E.2d 476 (1985), "[a]ny evidence of sanity is sufficient to present a jury issue when the defendant relies on the affirmative defense of insanity." 336 S.E.2d at 477. The prosecution presented sufficient evidence of sanity to create a jury issue. The South Carolina Supreme Court did not deny Rimert due process when it ruled there was sufficient evidence of

sanity to create a jury issue and, accordingly, upheld the jury's verdict.

ARGUMENT II

THE SOUTH CAROLINA SUPREME COURT DID NOT VIOLATE DUE PROCESS WHEN IT RULED THE TRIAL COURT PROPERLY REFUSED TO CHARGE SENTENCING CONSEQUENCES TO A JURY WHEN THAT JURY HAD NO AUTHORITY TO FIX SENTENCE.

This issue is controlled by *Shannon v. United States*, ___ U.S. ___, 114 S.Ct. 2419, 62 U.S.L.W. 4621 (1994). *Shannon* held that when a jury has no sentencing function, it should be admonished to reach its verdict without regard to what sentence might be imposed. Moreover, this Court held in *Shannon*, providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their fact finding responsibilities, and creates a strong possibility of confusion. *Id*. Based on this reasoning, it was not a violation of due process for the trial court to deny Rimert's request to charge the consequences

of its verdict to the jury when that jury had no function in determining the sentencing consequences of its decision on the issue of guilt.

The dangers inherent in instructing juries on sentencing consequences were highlighted in the state case of *State v. Huiett*, 271 S.C. 205, 246 S.E.2d 862 (1978). The jury in that case was instructed, over Huiett's objection, as to the possibility that appellant would be released from custody if the jury returned a verdict of not guilty by reason of insanity. Huiett, represented at trial by the same counsel who now represents Rimert, successfully obtained reversal of the jury's verdict. The South Carolina Supreme Court was persuaded by Huiett's argument that

> the jury may have failed to return a not guilty by reason of insanity verdict because it could result in freeing the defendant in a short time and thereby put a dangerous individual back in society.

246 S.E.2d at 864. This reason which

supports state law also supports federal law.

In *Shannon* this Court observed that an accurate instruction about the NGRI verdict would give no assurance to jurors who fear quick release as a result of an insanity verdict. As Justice Thomas wrote for the majority in *Shannon*:

> the only mandatory period of confinement for an insanity acquittal is the period between the verdict and the hearing. Instead of encouraging a juror to return an NGI verdict, . . . such information might have the opposite effect -- that is, a juror might vote to convict in order to eliminate the possibility that a dangerous defendant could be released after 40 days or less.

62 U.S.L.W. 4624. South Carolina law is not materially different in this respect.

In South Carolina a defendant acquitted on the basis of insanity is not necessarily committed for any period of time. A commitment hearing is held after an evaluation period "not to exceed one hundred twenty days." Depending on the result of

that hearing, the defendant may be released. Section 17-24-40 Code of Laws of South Carolina, 1985. Therefore, under South Carolina law, the only mandatory period of confinement for an insanity acquittee is the period between the verdict and the hearing. Id. The stark truth is that a jury instructed in the consequences of a NGRI verdict would be aware that the NGRI verdict could result in the defendant's release from custody immediately after a civil hearing. For this reason *Shannon* and *Huiett* are indistinguishable from the present case.

Rimert's additional argument, that a charge regarding sentencing consequences was appropriate in response to the Solicitor's closing argument, begs its own question by assuming the worst possible interpretation of the Solicitor's comment. Viewed as a whole, the Solicitor's argument was an admonishment to the jury that it should not be concerned with the consequences of its

verdict. Indeed, the Solicitor strongly implied that an insanity verdict would result in a civil commitment. He told the jury Rimert would be "dealt with by people that deal with people who are mentally ill." Perhaps this view of the Solicitor's comment was also the reason Rimert declined the trial judge's offer of a curative charge. Based upon that express rejection of a curative charge, Rimert should now be precluded from raising that comment as grounds for error, and the South Carolina Supreme Court implied as much when it declined to reach the issue.

Further, the Solicitor's comment was not a misstatement of South Carolina law. As was pointed out during oral argument before the state supreme court, a defendant who is found guilty but mentally ill is sent to a "facility designated . . . for treatment and retained there until in the opinion of the staff at that facility the

defendant may safely be moved to the general population of the Department of Corrections . . . ." Section 17-24-70, Code of Laws of South Carolina, Cum. Supp. 1993. The Solicitor did not inaccurately portray the law when he urged the jury not to consider the consequences of its verdict and reassured them that, no matter what their verdict, Rimert would be dealt with by people who deal with those who are mentally ill.

Finally, the addition of a juror's attempt to impeach his own verdict should not serve as a basis for certiorari. As Rimert acknowledges in his brief, both state and federal law prohibit attempts to impeach a jury verdict by way of testimony from a juror concerning alleged improprieties by the jury. *State v. Wells*, 249 S.C. 249, 153 S.E.2d 904 (1967)(testimony or affidavits of jurors will not be received on the hearing of a motion to set aside a verdict on the

ground of mistake, irregularity or misconduct on the part of the jury or some one or more of the panel); *State v. Parris*, 163 S.C. 295, 161 S.E. 496 (1931); *Tanner v. United States*, 483 U.S. 107 (1987); F.R.Evid. 606(b). The record on appeal contains the polling of the jury, along with juror Polk's express affirmance of his verdict. (R. p. 326).

In his petition, Rimert misrepresents the matter to which the State "acceded" when it did not object to supplementation of the Record on Appeal. The appellate rules of the South Carolina Supreme Court provide for liberal inclusion of matter in the Record on Appeal. Rule 209, SCACR (record on appeal "shall include all matter designated to be included by any party . . . "). Inclusion of matter in the Record on Appeal simply means that one party wants it included; it is not a stipulation concerning the weight

or admissibility of the evidence.[6]

The letter in which the State acquiesced to Rimert's motion to supplement the Record expressly states, "Respondent does not acquiesce to Rimert's argument concerning the weight this Court should give the supplemental information . . . ." (Letter to South Carolina Supreme Court dated July 12, 1994). Respondent has never agreed to Rimert's argument that the evidence was admissible. To the contrary, although the issue was not argued on appeal, the State's position is that the trial court properly refused to consider the evidence. *State v. Wells], supra; State v. Parris, supra.*

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[6]If inclusion of disputed matter in a record on appeal precluded appellate argument on the issue of the matter's admissibility or propriety, no disputed matter could ever be placed in an appellate record.

CONCLUSION

Rimert failed to carry his burden of proof on the issue of insanity, and the South Carolina Supreme Court did not violate due process when it refused to second guess the jury on that issue. Additionally, the South Carolina Supreme Court did not deny Rimert due process when it held the trial court properly refused to charge the sentencing consequences to a jury which lacked authority over sentencing. Finally, since Rimert expressly rejected the offer of a curative charge in response to a remark by the Solicitor, the South Carolina Supreme did not deny him due process when, without expressly reaching the issue, it implied he was precluded from asserting error based on that remark. For these reasons

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Respectfully submitted,

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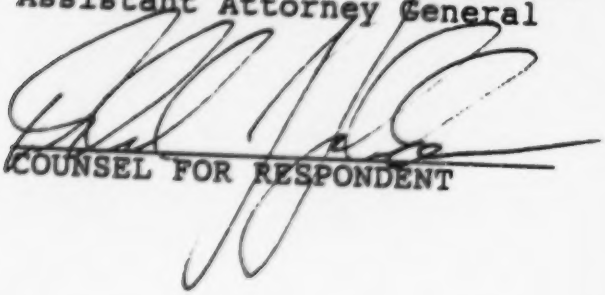

COUNSEL FOR RESPONDENT

December 1, 1994